Hilary Term
[2021] UKSC 2
On appeal from: [2018] EWHC 2368 (Admin)

JUDGMENT

R (on the application of KBR, Inc) (Appellant) *v* Director of the Serious Fraud Office (Respondent)

before

Lord Lloyd-Jones
Lord Briggs
Lady Arden
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

5 February 2021

Heard on 13 October 2020

Appellant	*Respondent*
Lord Pannick QC Richard Kovalevsky QC Jamas Hodivala QC (Instructed by Barry Vitou, Greenberg Traurig LLP)	Sir James Eadie QC Jonathan Hall QC Simon Pritchard (Instructed by The Government Legal Department)

LORD LLOYD-JONES: (with whom Lord Briggs, Lady Arden, Lord Hamblen and Lord Stephens agree)

1. The respondent, the Serious Fraud Office ("SFO"), invited this Court to proceed on the basis of the factual position at the date of the Divisional Court hearing on 17 April 2018, and we agree to do so. On 25 July 2017, at a meeting in London, the SFO gave a notice on behalf of the Director of the SFO pursuant to section 2(3) of the Criminal Justice Act 1987 ("the 1987 Act") to an officer of the appellant company ("KBR, Inc"). The notice required KBR, Inc, a US company, to collate material held abroad and produce it to the SFO under criminal penalty for failing to do so. KBR, Inc did not have a fixed place of business in the United Kingdom and had never carried on business in the United Kingdom. KBR, Inc sought to quash the notice on the ground that section 2(3) of the 1987 Act does not have extra-territorial effect. KBR, Inc contends that there was no jurisdiction for the SFO to issue the notice requiring the production of material held by it outside the UK.

2. KBR, Inc is incorporated in the United States. The US Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") were conducting investigations into the affairs of Unaoil, a Monaco based company, in relation to international projects involving several global companies including KBR, Inc whose interactions with Unaoil were a subject of those investigations.

3. KBR, Inc has UK subsidiaries, including Kellogg Brown and Root Ltd ("KBR UK") which was under investigation by the SFO. The investigation was related to the SFO's ongoing investigation into the activities of Unaoil.

4. On 4 April 2017, the SFO issued a notice under section 2(3) of the 1987 Act ("the April notice") to KBR UK. The April notice made 21 requirements for the production of information and documentation "held by KBR UK". KBR UK provided various materials to the SFO in response to the April notice. It made clear that certain material was not in its possession or control but, if and to the extent it exists, was held by KBR, Inc in the United States. A meeting was offered with the SFO in London to discuss the investigation and it was agreed that it should take place on 25 July 2017. The SFO insisted that it should be attended not merely by lawyers representing KBR, Inc but by officers of that company, and accordingly officers agreed to attend.

5. Ms Eileen Akerson, the Executive Vice President, General Counsel, and then also Corporate Secretary of KBR, Inc and Ms Julia Symon, KBR, Inc's Chief Compliance Officer, flew to the United Kingdom from the United States to attend

the meeting. During the meeting, Ms Akerson was handed a section 2(3) notice ("the July notice").

6. On the morning of 25 July 2017, and prior to the meeting, a draft of the notice had been prepared by the SFO in case "it might be necessary to hand the notice" to Ms Akerson or Ms Symon "in the event that a satisfactory response was not received as to [KBR, Inc's] willingness to provide the outstanding materials sought in the April notice". In the course of the meeting on 25 July, the SFO asked whether the outstanding material requested in the April notice, not yet provided on the basis that it was located outside the United Kingdom, would be provided. In response, the SFO was told that the Board of KBR, Inc required time to consider the position. At that point, Ms Akerson's name was inserted in the draft July notice and, thus completed, it was handed to her.

7. The deadline for compliance contained in the July notice was 4 August 2017. However, for various reasons this deadline was extended until 22 September 2017.

8. In a letter dated 20 September 2017 Pinsent Masons LLP (who were then acting for KBR, Inc) wrote on behalf of KBR, Inc to the SFO seeking clarification as to who was the subject of the July notice, and explaining that in any event KBR, Inc did not consider the July notice to be lawful on the basis that:

> (1) the July notice unlawfully required the production of documents held entirely outside the UK jurisdiction by a company that was incorporated and situated entirely outside the UK jurisdiction; and
>
> (2) if KBR, Inc was the intended recipient, the July notice had not been validly served.

9. The SFO was invited to withdraw the July notice and to note that if the SFO was unwilling to do so, KBR, Inc would seek a judicial review.

10. By letter dated 21 September 2017, the SFO clarified that KBR, Inc was the intended recipient of the July notice and went on to state:

> "Section 2 Notices directed at a company are, as you know, served on an officer of the company. The July Notice is addressed to 'Eileen Akerson, KBR Inc', and it contains multiple requests for the production of material 'held by KBR' (distinguished from UK subsidiaries of KBR, Inc, which are

> referred to in the Notice as KBR UK). The Notice was validly served on an officer of KBR, Inc in the United Kingdom, and the Notice is enforceable against KBR, Inc."

11. The SFO declined to withdraw the July notice.

12. In the Divisional Court KBR, Inc relied upon a witness statement from William Jacobson stating, in relation to the effect of the July notice on KBR, Inc:

> "I am informed that it would not [be straightforward to identify and collate responsive material] and that there are a number of practical and logistical hurdles to be crossed (para 5) … The data for the custodians referenced in July Notice will first need to be identified and segregated from the other custodial data in the review platform. The collation of the relevant material would require significant steps to be taken in the US (para 7) … Identifying and collating this material would be a very time consuming and burdensome task ..." (para 8)
>
> and
>
> "In summary, the steps which need to be taken in the US are not 'modest' as the defendant suggests in its Skeleton Argument." (para 9)

<u>The statutory provisions</u>

13. The SFO is established by section 1 of the 1987 Act. Section 1(3) confers on the Director of the SFO the power to

> "investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud."

Section 2(1) provides that the powers of the Director under section 2

> "shall be exercisable, but only for the purposes of an investigation under section 1 above … in any case in which it appears to him that there is good reason to do so for the purpose

of investigating the affairs, or any aspect of the affairs, of any person."

14. Section 2(3) provides:

> "The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified, any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and -
>
> (a) if any such documents are produced, the Director may -
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> (i) take copies or extracts from them;
>
> (ii) require the person producing them to provide an explanation of any of them;
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> (b) if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are."

15. Sections 2(4) and 2(5) provide:

> "(4) Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation to any documents, that there are reasonable grounds for believing -
>
> (a) that -
>
> (i) a person has failed to comply with an obligation under this section to produce them;

(ii) it is not practicable to serve a notice under subsection (3) above in relation to them; or

(iii) the service of such a notice in relation to them might seriously prejudice the investigation; and

(b) that they are on premises specified in the information,

he may issue such a warrant as is mentioned in subsection (5) below.

(5) The warrant referred to above is a warrant authorising any constable -

(a) to enter (using such force as is reasonably necessary for the purpose) and search the premises, and

(b) to take possession of any documents appearing to be documents of the description specified in the information or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them."

16. Section 2(13) provides that any person who without reasonable excuse fails to comply with a requirement imposed on him under section 2 shall be guilty of an offence and shall be liable on summary conviction to imprisonment for a term not exceeding six months, or to a fine, or both.

17. Section 2(16) creates an offence where any person, knowing or suspecting that an investigation by the police or the SFO into serious or complex fraud is being or is likely to be carried out, falsifies, conceals, destroys or otherwise disposes of documents he knows or suspects are or would be relevant to such an investigation. It is not suggested in the present case that the documents which were the subject of the July notice had been sent out of the jurisdiction in breach of section 2(16).

The decision of the Divisional Court

18. KBR, Inc applied for judicial review to quash the July notice on three grounds:

(1) The July notice was ultra vires as it requested material held outside the jurisdiction from a company incorporated in the United States of America;

(2) It was an error of law on the part of the Director to exercise his powers under section 2 of the 1987 Act despite his power to seek mutual legal assistance from the US authorities;

(3) The July notice was not effectively served by the SFO handing it to a senior officer of KBR, Inc who was temporarily present in the jurisdiction.

KBR, Inc failed on all three grounds and the application was dismissed.

19. On the first issue, which is the only issue under appeal, the Divisional Court (Gross LJ and Ouseley J) held [2018] EWHC 2368 (Admin); [2019] QB 675 that, despite the principle that, unless a contrary intention appears, statutes have territorial but not extra-territorial application, section 2(3) must have an element of extra-territorial application. Gross LJ observed that it was scarcely credible that a UK company could resist an otherwise lawful notice under section 2(3) on the ground that the documents in question were held on a server out of the jurisdiction. The policy underlying that subsection required the section to have some extra-territorial application in 1987 and the same policy should permit it to apply where technological developments had further illustrated the necessity for a degree of extra-territorial application. The question was, therefore, one of the extent rather than the existence of the extra-territorial reach of the section. While the wording of the subsection and its legislative history were inconclusive, the legislative purpose and the mischief at which it was aimed permitted of no such doubt. Accordingly, it was capable of extending to some foreign companies in respect of documents held abroad. However, a nuanced answer was required which would extend the reach of the subsection to foreign companies in respect of documents held outside the jurisdiction "when there is a sufficient connection between the company and the jurisdiction" (at para 71). The Divisional Court considered that, on the evidence before it, it was impossible to distance KBR, Inc from the transactions central to the SFO's investigation of KBR UK and accordingly KBR, Inc's own actions made good a sufficient connection between it and the United Kingdom to bring it within the reach of section 2(3).

20. The Divisional Court certified two points of law of general public importance:

> (1) Does section 2(3) of the 1987 Act permit the Director of the SFO to require a person to produce information held outside England and Wales?
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> (2) If so, does the Director of the SFO have power to do so by reference to the "sufficient connection test"?

On 8 April 2019 the Supreme Court (Lord Kerr, Lord Briggs and Lord Sales) granted permission to appeal.

The presumption against extra-territorial effect

21. The starting point for a consideration of the scope of section 2(3) is the presumption in domestic law in this jurisdiction that legislation is generally not intended to have extra-territorial effect. A particularly clear statement of this principle is to be found in the speech of Lord Bingham in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153 concerning the scope of application of the Human Rights Act 1998:

> "In resisting the interpretation, upheld by the courts below, that the HRA has extra-territorial application, the Secretary of State places heavy reliance on what he describes as 'a general and well established principle of statutory construction'. This is (see *Bennion, Statutory Interpretation*, 4th ed (2002), p 282, section 106) that 'Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom'. In section 128 of the same work, p 306, the author adds: 'Unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters.' In *Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61, Cozens-Hardy MR, with the concurrence of Fletcher Moulton and Farwell LJJ, endorsed a statement to similar effect in Maxwell on the Interpretation of Statutes 4th ed (1905), pp 212-213:
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> > 'In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject matter or history of the enactment, the

> presumption is that Parliament does not design its statutes to operate [on its subjects] beyond the territorial limits of the United Kingdom.'
>
> Earlier authority for that proposition was to be found in cases such as *Ex p Blain; In re Sawers* (1879) 12 Ch D 522, 526, per James LJ, and *R v Jameson* [1896] 2 QB 425, 430, per Lord Russell of Killowen CJ. Later authority is plentiful: see, for example, *Attorney General for Alberta v Huggard Assets Ltd* [1953] 1 AC 420, 441, per Lord Asquith of Bishopstone for the Privy Council; *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 145, per Lord Scarman; *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 13, per Lord Walker of Gestingthorpe for the Privy Council; *Lawson v Serco Ltd* [2006] ICR 250, para 6, per Lord Hoffmann; *Agassi v Robinson* [2006] 1 WLR 1380, paras 16, 20, per Lord Scott of Foscote and Lord Walker of Gestingthorpe. That there is such a presumption is not, I think, in doubt. It appears (per Lord Walker in *Al Sabah*, above) to have become stronger over the years." (at para 11)

22. Similarly, Lord Rodger observed in *Al-Skeini* at para 45:

> "Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted, 'so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law': *Maxwell on the Interpretation of Statutes*, 12th ed (1969), p 183. It would usually be both objectionable in terms of international comity and futile in practice for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom. So, in the absence of any indication to the contrary, a court will interpret legislation as not being intended to affect such people. They do not fall within 'the legislative grasp, or intendment,' of Parliament's legislation, to use Lord Wilberforce's expression in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152C-D."

23. However, international law also recognises a legitimate interest of States in legislating in respect of the conduct of their nationals abroad. Nationals travelling or residing abroad remain within the personal authority of their State of nationality and, consequently, it may legislate with regard to their conduct when abroad subject to limits imposed by the sovereignty of the foreign State (*Oppenheim's International Law*, vol 1: Peace, 9th ed (1992), Part I, para 138). As a result, in such circumstances

the strength of the presumption against extra-territorial application of legislation will be considerably diminished and it may not apply at all. (See *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43; [2010] 1 AC 90, para 10 per Lord Mance.) The matter was stated by Lord Rodger in *Al-Skeini* in the following terms (at para 46):

> "Subjects of the Crown, British citizens, are in a different boat. International law does not prevent a state from exercising jurisdiction over its nationals travelling or residing abroad, since they remain under its personal authority: *Oppenheim's International Law*, 9th ed (1992), vol 1, Pt I, para 138. So there can be no objection in principle to Parliament legislating for British citizens outside the United Kingdom, provided that the particular legislation does not offend against the sovereignty of other states."

24. The presumption reflects, in part, the requirements of international law that one State should not by the claim or exercise of jurisdiction infringe the sovereignty of another State in breach of rules of international law. Thus, for example, legislation requiring conduct in a foreign State which would be in breach of the laws of that State or otherwise inconsistent with the sovereign right of that State to regulate activities within its territory may well be a breach of international law. There is clearly a compelling rationale for the presumption in such cases. However, the rationale and resulting scope of the presumption are wider than this. They are also rooted in the concept of comity. The term "comity" is used here to describe something less than a rule of international law. Judge Crawford explains that certain usages are carried on out of courtesy or comity and are not articulated or claimed as legal requirements. "International comity is a species of accommodation: it involves neighbourliness, mutual respect, and the friendly waiver of technicalities." (Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 21. See also F A Mann, *Foreign Affairs in English Courts*, (1986), p 134.) In the particular context of claims to extra-territorial jurisdiction Crawford observes (at p 468):

> "Comity arises from the horizontal arrangement of state jurisdictions in private international law and the field's lack of a hierarchical system of norms. It plays the role of a somewhat uncertain umpire: as a concept, it is far from a binding norm, but it is more than mere courtesy exercised between state courts. The Supreme Court of Canada said in *Morguard v De Savoye* [1990] 3 SCR 1077, 1096 citing the US Supreme Court in *Hilton v Guyot* 159 US 113, 164 (1895) that:

> ‘Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.’”

25. The lack of precisely defined rules in international law as to the limits of legislative jurisdiction makes resort to the principle of comity as a basis of the presumption applied by courts in this jurisdiction all the more important. As a result, the presumption in domestic law is more extensive and reflects the usages of States acting out of mutual respect and, no doubt, the expectation of reciprocal advantage. Accordingly, it is not necessary, in invoking the presumption, to demonstrate that the extra-territorial application of the legislation in issue would infringe the sovereignty of another State in violation of international law.

26. In the present case we are not concerned with jurisdiction over the conduct abroad of a UK national or a UK registered company. Indeed, it was common ground between the parties that if the addressee had been a British registered company section 2(3) would have authorised the service of a notice to produce documents held abroad by that company. Similarly, we are not concerned with the position of a foreign company which has a registered office or a fixed place of business in this jurisdiction or which carries on business here. The addressee of the notice, KBR, Inc, has never carried on business in the United Kingdom or had a registered office or any other presence here. The attendance by senior corporate officers at the meeting in London on 25 July 2017 and the fact that Ms Akerson was served with the notice on behalf of the company on that occasion do not alter this fact. Accordingly, the presumption against extra-territorial effect clearly does apply here.

Is the presumption rebutted by the language of the statute?

27. The question for consideration is whether Parliament intended to confer on the SFO power to compel a foreign company to produce documents held abroad, on pain of a criminal penalty in this jurisdiction. The answer will depend on the wording, purpose and context of the legislation considered in the light of relevant principles of interpretation and principles of international law and comity.

28. On behalf of the SFO, Sir James Eadie QC draws attention to the breadth of the words used in section 2(3). In his submission, the words are deliberately wide. It confers a power exercisable against “the person under investigation” or “any other person” and can relate to the production of “any specified documents” provided that the documents relate to “any matter relevant to [an] investigation”. Furthermore, the

power under section 2(3) is not limited to documents which are in the possession or under the control of the recipient of the notice; rather, the controlling factor is that if the recipient of the notice cannot directly or indirectly procure the production of documents, he must have a reasonable excuse for not producing them (*In re Arrows Ltd (No 4)* [1995] 2 AC 75, 104G per Lord Browne-Wilkinson). While the breadth of these provisions provides some support for the SFO's case, it is to be noted that when legislation is intended to have extra-territorial effect Parliament frequently makes express provision to that effect. Well known examples are section 134 of the Criminal Justice Act 1988 on acts of torture committed abroad and section 72 of the Sexual Offences Act 2003 on certain specified sexual offences committed abroad. Of particular relevance here, given the reasoning of the Divisional Court, is section 12 of the Bribery Act 2010 which criminalises conduct outside the United Kingdom if it would form part of a relevant offence if done in the United Kingdom and if the actor meets one of certain defined criteria establishing a close connection with the United Kingdom. The more exorbitant the jurisdiction, the more is likely to be required of the statutory provisions in order to rebut the presumption against extra-territorial effect. Section 2(3) includes no such express provision.

29. An intention on the part of Parliament to give extra-territorial effect to a statutory provision may also be implied, inter alia, from the scheme, context and subject matter of the legislation. (See, for example, *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23; [2016] AC 1, paras 212-213 per Lord Toulson and Lord Hodge.) I am unable to find any clear indication, either for or against the extra-territorial effect, in the other provisions of the 1987 Act. Contrary to the submission of Lord Pannick QC on behalf of KBR, Inc, section 17 of the 1987 Act, which provides that the Act "extends to England and Wales only" is in my view not relevant to the present issue. That section is concerned with the wholly distinct question of the extent of the legislation and simply provides that it forms part of the law of England and Wales. It says nothing about whether it has extra-territorial effect. Lord Pannick also relies on sections 2(4) and (5) of the 1987 Act which provide that where a person has failed to comply with an obligation under section 2 to produce any documents, a justice of the peace may, on information laid by a member of the SFO, issue a warrant authorising any constable to enter and search premises and to take possession of documents. Clearly this method of enforcement could not have been envisaged to apply where the addressee and the documents are outside the jurisdiction. Moreover, impracticality of enforcement is a particularly relevant consideration when determining whether a statutory provision has extra-territorial scope (*Masri v Consolidated Contractors International (UK) Ltd (No 4)* at para 22 per Lord Mance). This may, therefore, provide some support for the submission of KBR, Inc. However, while the intention behind a provision in a statute needs to be ascertained by looking at the statute as a whole, it does not follow that all provisions in a statute have the same territorial ambit. (See *R (Jimenez) v First-tier Tribunal (Tax Chamber)* [2019] EWCA Civ 51; [2019] 1 WLR 2956, para 34 per Patten LJ.) Sections 2(4) and (5) do not necessarily prevent the extra-territorial application of

section 2(3), notwithstanding the fact that the enforcement procedure for which they provide would not be available.

30. A submission on behalf of the SFO, which found favour before the Divisional Court, was that section 2(3) must involve at least an element of extra-territorial application and that the jurisdiction for which it contends can be founded on this. However, to my mind this does nothing to advance the SFO's case. The argument is that section 2(3) must have an element of extra-territorial application because it is scarcely credible that a UK company could resist an otherwise lawful notice on the ground that the documents in question were held on a server out of the jurisdiction. (As indicated above, it was common ground before us that section 2(3) would apply to such a case.) The Divisional Court used this as a stepping-stone leading to its conclusion that extra-territorial jurisdiction was intended on the facts of this case. Gross LJ explained (at para 65) that the fact that section 2(3) must have some extra-territorial effect is important, because it means that the question is then the extent of the extra-territorial reach rather than the existence of any extra-territorial effect. However, first, it is questionable whether in the hypothetical situation the legislation is given any material extra-territorial effect. A UK company would be required to produce here a document it holds overseas. It would simply be required to bring that document into the jurisdiction in order to produce it. Secondly, as we have seen, the presumption against extra-territorial effect, if it applies at all, applies with much less force to legislation governing the conduct abroad of a UK company, as postulated in the hypothetical example. Thirdly, in any event, this casts no light as to the intention of Parliament as to whether the provision should apply in the very different circumstances of the present case where the addressee of the notice is a foreign company which has never carried on business here and has no presence here. I consider therefore that this example provides no satisfactory basis for the reasoning of Divisional Court which is founded on it.

31. There is, however, greater force in a further submission on behalf of the SFO. It is clear that an intention to give a statute extra-territorial effect may be implied if the purpose of the legislation could not effectually be achieved without such effect (*Cox v Ergo Versicherung AG* [2014] UKSC 22; [2014] AC 1379, para 29 per Lord Sumption). On behalf of the SFO, Sir James Eadie QC submits that the territorial scope of section 2(3) must be considered in the light of the public interest in the effective investigation of serious fraud, as reflected in international instruments such as the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 ("the OECD Convention"). He submits that under the OECD Convention, States have agreed to combat bribery of foreign public officials to the fullest extent and by article 5 the parties have agreed that the "[i]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with

another State or the identity of the natural or legal persons involved". He submits that the observations of Lord Toulson and Lord Hodge in *Bilta (UK) Ltd v Nazir (No 2)*, para 213, concerning the need for effective investigation of company fraud informing the territorial scope of section 213 of the Insolvency Act 1986, apply mutatis mutandis to an investigation into complex fraud by the SFO using powers under section 2(3).

32. The question whether such a purposive reading is capable of rebutting the presumption against extra-territorial application will depend on the provisions, purpose and context of the particular statute. It also requires consideration of the legislative history of the statute and whether Parliament can be taken to have intended that the purpose of the legislation be achieved by other means, matters to which I now turn.

Legislative history

33. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 Lord Bingham observed at para 8:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

In the present case it is submitted on behalf of KBR, Inc that the purpose of the relevant statutory provisions, as revealed by the context in which they were enacted, clearly establishes that section 2(3) was not intended to have extra-territorial effect. In support of this submission we were taken in detail to the legislative history of the 1987 Act and subsequent legislation in this field.

34. The relevant provisions of the 1987 Act were enacted to give effect to the recommendations in the 1986 report of the Fraud Trials Committee chaired by Lord Roskill ("the Roskill Report"). The Roskill Report (paras 2.41, 2.62, 2.64) recommended that the police or the recommended organisation with overall responsibility for the investigation and prosecution for serious fraud cases should be given powers comparable to those of the Department of Trade and Industry ("the DTI") under section 447 of the Companies Act 1985 to require the production of documents. That section of the Roskill Report did not address the issue of extra-territorial effect. However, section 447(1)(d) of the Companies Act 1985 at that time

empowered the DTI to require the production of documents by "a body corporate incorporated outside Great Britain which is carrying on business in Great Britain or has at any time carried on business there". Furthermore, section 453(1) provided:

> "Sections 432 to 437, 439, 441 and 452(1) apply to all bodies corporate incorporated outside Great Britain which are carrying on business in Great Britain or have at any time carried on business there as if they were companies under this Act, but subject to such (if any) adaptations and modifications as may be specified by regulations made by the Secretary of State."

These powers were therefore exercisable by the DTI in relation to foreign companies, but only if they were carrying on or had carried on business here. By contrast, there is no comparable provision in the 1987 Act applying section 2(3) to foreign companies carrying on or having carried on business here. This is, to my mind, inconsistent with any suggestion that section 2(3) should apply to such foreign companies, let alone to foreign companies generally. The SFO is, therefore unable to derive any assistance from section 447 of the Companies Act 1985.

35. The Roskill Report (paras 5.20-5.22 and 5.41-5.46) did however address the obtaining of foreign evidence for use in criminal trials here. It noted that there was no power to compel someone out of the jurisdiction to come to this country to give oral evidence or to bring documents with him and that evidence taken abroad was not admissible in criminal proceedings in this country. Letters of request could be issued through diplomatic channels seeking the voluntary assistance of foreign authorities, but this was a slow, cumbersome and not always effective procedure. It recommended that legislation should be sought to enable evidence to be taken on commission abroad for use in criminal cases in England and Wales (para 5.43 and recommendation 26). The Report noted that many countries do not have legislation permitting evidence to be prepared for use abroad and it observed that progress in this area should depend to a large extent on international agreements to provide for reciprocal arrangements regarding the taking and receipt of evidence. Such treaties might provide powers to enable the legal authorities in one country to call upon the judicial authorities in another to invoke compulsory powers against witnesses in that other country. It noted that the United Kingdom was not at that time a party to any international mutual assistance treaties and continued (at para 5.44):

> "Our inquiry has shown us the vital importance of close international co-operation if serious fraud offences are to be discovered and offenders properly brought to justice. We recognise that concluding such treaties is a long term matter. We believe however, that close attention must be given to the question of the level of mutual assistance which the United

> Kingdom is able to afford other countries, and to receive from them."

It recommended that negotiations should be set in train with other countries to provide for reciprocal arrangements regarding the taking and receipt of evidence on commission (para 5.44 and recommendation 27).

36. There is, therefore, nothing in the Roskill Report which recommends the creation of a statutory power which would permit UK authorities unilaterally to compel, under threat of criminal sanction, the production in this country of documents held out of the jurisdiction by a foreign company. On the contrary it emphasises the importance of establishing reciprocal arrangements for obtaining evidence from abroad.

37. The legislative history of the Parliamentary Bill which became the 1987 Act and the history of subsequent legislation on the same subject are also informative. In *Comr of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306 at 324A-D, Lord Bridge, delivering the judgment of the Judicial Committee of the Privy Council, explained the potential relevance of subsequent legislation in the following terms:

> "The principle is clearly stated by Lord Sterndale MR in *Cape Brandy Syndicate v Inland Revenue Comrs* [1921] 2 KB 403, 414, where he said:
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> > 'I think it is clearly established in *Attorney General v Clarkson* [1900] 1 QB 156 that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.'
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> This statement has subsequently been referred to with approval on a number of occasions by the House of Lords: see *Ormond Investment Co Ltd v Betts* [1928] AC 143, 156; *Kirkness v John*

Hudson & Co Ltd [1955] AC 696, 711; *Attorney General v Prince Ernest Augustus of Hanover* [1957] AC 436, 473."

38. The Criminal Justice Bill 1986/87 contained a clause (clause 18) which provided a court procedure for requesting the assistance of foreign courts in obtaining evidence from abroad. It provided that a magistrate or judge should have the power to authorise that a letter of request should be sent to or through an appropriate authority exercising jurisdiction in another country requesting it to assist in obtaining evidence if it appeared that criminal proceedings had been instituted or were likely to be instituted if evidence was obtained for the purpose. This accorded with the view expressed in the Roskill Report that existing informal procedures through diplomatic channels tended to be ineffective and its recommendation that reciprocal arrangements should be agreed for the obtaining of evidence from abroad. In the event, the calling of a general election resulted in the enactment of the Bill in a truncated form limited to Part I which established the SFO. Clause 18 which appeared in Part III was omitted. However, in the new Parliament the clause was brought back as clause 27 of the Criminal Justice Bill 1988 and it was enacted as section 29 of the Criminal Justice Act 1988. Section 29(1) provided:

> "(1) Where on an application made in accordance with the following provisions of this section it appears to a justice of the peace or judge that criminal proceedings -
>
> (a) have been instituted; or
>
> (b) are likely to be instituted if evidence is obtained for the purpose,
>
> he may order that a letter of request shall be issued to a court or tribunal or appropriate authority specified in the order and exercising jurisdiction in a place outside the United Kingdom, requesting it to assist in obtaining for the purposes of the proceedings evidence specified in the letter."

39. Section 29 of the Criminal Justice Act 1988 appeared in Part III which was entitled "Other provisions about evidence in criminal proceedings". It was not directed at obtaining evidence for the investigation of crime in general but at obtaining evidence for use in criminal trials which had been instituted or which were likely to be instituted if evidence was obtained for the purpose. Nevertheless, it provides an indication that Parliament intended that evidence should be secured from abroad by international co-operation as envisaged in the Roskill Report. It is

not easy to reconcile this approach with the SFO's submission that section 2(3) of the 1987 Act confers a power whereby a UK authority could unilaterally compel, under threat of criminal sanction, the production here of documents held abroad by a foreign company.

40. In subsequent legislation, the statutory scheme which permits the United Kingdom's participation in international co-operation in this field was extended by Parliament to the investigation of possible offences and even to a pre-investigation phase, subject to various protections and safeguards. The enactment of these successive provisions provides support for the view that Parliament did not intend these powers, operating through reciprocal co-operation with foreign authorities, and the statutory protections and safeguards to which they are subject, to sit alongside a unilateral power in section 2(3) of the breadth contended for by the SFO.

41. The Criminal Justice (International Co-operation) Act 1990 stated in its long title that it is an "Act to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations". It put in place a comprehensive domestic regime for international mutual legal assistance in criminal matters. Its enactment enabled the United Kingdom to ratify the European Convention on Mutual Assistance in Criminal Matters, 1959 and to implement the Commonwealth Scheme relating to Mutual Assistance in Criminal Matters, 1986 (the Harare Scheme). The 1990 Act repealed section 29 of the 1988 Act. Section 3(1) of the 1990 Act which appears in Part I entitled "Criminal proceedings and investigations" and under the sub-heading "Mutual provision of evidence" expressly referred to investigation:

> "(1) Where on an application made in accordance with subsection (2) below it appears to a justice of the peace or a judge or, in Scotland, to a sheriff or a judge -
>
> (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
>
> (b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,
>
> he may issue a letter ('a letter of request') requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation."

Section 3(3) provided that a designated prosecuting authority might itself issue a letter of request in certain specified circumstances. The Director of the SFO was a designated prosecuting authority for this purpose (article 2 and Schedule 1, Criminal Justice (International Co-operation) Act 1990 (Designation of Prosecuting Authorities) Order 1991 (SI 1991/1224)). The 1990 Act included safeguards in relation to the use which might be made of evidence obtained by virtue of a letter of request. Section 3(7) provided that such evidence should not be used for any purpose other than that specified in the letter and provided that when a document so obtained was no longer required for that purpose it should be returned to the foreign authority.

42. Section 2 of the 1987 Act was amended by the Criminal Justice and Public Order Act 1994 and later legislation to add sections 2(1A) and (1B) and section 2(8A) to allow the SFO to act pursuant to a request for assistance from a foreign authority for the provision of evidence.

43. The provisions of the Criminal Justice (International Co-operation) Act 1990 relating to requests to obtain evidence from abroad for use in a prosecution or investigation taking place in the United Kingdom, were substantially repealed and replaced by the Crime (International Co-operation) Act 2003. Section 7(1) of the 2003 Act is in similar terms to section 3(1) of the 1990 Act. Section 7(5) further provides that a designated prosecuting authority, in addition to a judicial authority, may itself in certain specified circumstances make a request for assistance in obtaining evidence abroad. The Director of the SFO is a designated prosecuting authority (article 2, Crime (International Co-operation) Act 2003 (Designation of Prosecuting Authorities) Order 2004 (SI 2004/1034)). The 2003 Act includes in section 9 safeguards similar to those in section 3(7) of the 1990 Act in relation to the use of evidence obtained and its return.

44. The United Kingdom and the United States of America have entered into international agreements concerning mutual legal assistance. On 6 January 1994 the United Kingdom and the United States of America signed a bilateral treaty on mutual legal assistance pursuant to which their respective law enforcement authorities could request assistance in investigating criminal matters, including the provision of documents, records and evidence. More recently, the Agreement on Mutual Legal Assistance between the United States of America and the European Union, 25 June 2003 was brought into effect between the United Kingdom and the United States by an instrument signed on 16 December 2004. Under these arrangements, requests for mutual assistance are made between administrative bodies.

45. I have referred to this legislative history in some detail because it supports KBR, Inc's case. It can be seen that successive Acts of Parliament have developed the structures in domestic law which permit the United Kingdom to participate in

international systems of mutual legal assistance in relation to both criminal proceedings and investigations. Of critical importance to the functioning of this international system are the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded. (See generally *Gohil v Gohil* [2012] EWCA Civ 1550; [2013] Fam 276.) It is to my mind inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the State where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance.

Serious Organised Crime Agency v Perry

46. Judicial decisions concerning the effect of different statutory provisions may be instructive by way of analogy but they need to be approached with some caution because they are concerned with entirely different statutory schemes, often enacted for different purposes and operating in different contexts.

47. KBR, Inc draws particular attention to the decision of the Supreme Court in *Serious Organised Crime Agency v Perry* [2012] UKSC 35; [2013] 1 AC 182. Perry was convicted in Israel of a number of offences of fraud in relation to a pension scheme which he had operated there. The Serious Organised Crime Agency ("SOCA") brought proceedings in England for a civil recovery order under the Proceeds of Crime Act 2002 ("the 2002 Act") seeking to deprive Mr Perry and members of his family and associated entities of assets obtained in connection with his criminal conduct, wherever in the world those assets might be situated. On the application of SOCA a judge made a disclosure order under section 357 of the 2002 Act against Perry, his wife and two daughters, none of whom was resident or domiciled in the jurisdiction. Information notices under the disclosure order requesting information were given to Perry and his daughters by letter addressed to his house in London. The intended recipients were, and were known by SOCA to be, outside the jurisdiction of the United Kingdom. They applied to set aside the information notices. It was submitted on their behalf that the authority given by a disclosure order to give information notices only applies to notices given to persons within the jurisdiction. In making this submission they relied in particular on the presumption that, unless it clearly provides to the contrary, a statute will not have extra-territorial effect.

48. The provisions relating to disclosure orders are contained in Part 8 of the 2002 Act. Part 8 applies to both confiscation proceedings under Parts 2, 3 and 4 of the Act and civil recovery proceedings under Part 5. Section 357 empowers a judge

to make a disclosure order if, in relation to Part 5, property specified in the application for the order is subject to a civil recovery investigation and the order is sought for the purposes of the investigation (sections 357(1) and 3(b)). Section 357(4) defines a disclosure order as an order authorising an appropriate officer to give "to any person the appropriate officer considers has relevant information" notice in writing requiring him, with respect to any matter relevant to the investigation for the purposes of which the order is sought, to answer questions, provide information specified in the notice or produce documents specified in the notice. Relevant information is information which the appropriate officer concerned considers to the be relevant to the investigation (section 357(5)). Section 358 sets out the grounds for making a disclosure order.

49. There are close similarities between the provisions governing a disclosure order under the 2002 Act and a production order under section 2(3) of the 1987 Act. Both confer a power to make an order in respect of any person. Section 359 of the 2002 Act, like section 2(13) of the 1987 Act, provides for criminal sanctions including imprisonment for failure without reasonable excuse to comply with a requirement imposed under a disclosure order.

50. The Supreme Court held unanimously that section 357 of the 2002 Act did not authorise the imposition of a disclosure order on persons out of the jurisdiction. Lord Phillips dealt with the point (at para 94) in trenchant terms.

> "The point is a very short one. No authority is required under English law for a person to request information from another person anywhere in the world. But section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. Section 357, read with section 359, does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction."

51. In the course of submissions before us, Lord Pannick suggested that the reference in this passage to a breach of international law should be read as referring

to a breach of comity in the sense of a non-binding usage. While it may well be correct that not every case in which legislation confers powers to impose obligations on foreign persons abroad under pain of criminal sanction would necessarily constitute a breach of international law, this does nothing to diminish the force of this pronouncement as to the effect of the presumption against extra-territorial effect in the domestic law of the United Kingdom which is founded on both international law and comity.

52. The similarity between section 357 of the 2002 Act and section 2(3) of the 1987 Act with which we are concerned is striking. Furthermore, as Gross LJ accepted in the Divisional Court in this case (at para 59(iv)), the public interest considerations under the 2002 Act are very similar to those pertaining to the 1987 Act. In his judgment in *Perry* Lord Phillips went on to refer to two further matters. First, he noted (at para 95) that section 376 of the 2002 Act as originally enacted included provision for the issue by the judge of a letter of request for the purpose of obtaining information relevant to a confiscation order. It had been submitted that this provision would have been superfluous if the authority conferred by section 357 extended to persons beyond the United Kingdom. (In this regard, it should be noted that Lord Reed in a concurring judgment, when addressing a separate appeal in relation to a property freezing order, commented (at para 115) on the fact that Parts 2, 3 and 4 of the 2002 Act contain provisions under which if realisable property is held outside the United Kingdom the prosecutor can send a request to the Secretary of State with a view to its being forwarded to the government of the country where the property is situated (sections 74, 141 and 222).) Secondly, Lord Phillips noted (at para 96) that the 2002 Act conferred other investigatory powers, including a power to make a production order in relation to specified material, the power to issue search and seizure warrants and the power to make a customer information order. It had been submitted that the provisions conferring these powers, either as a matter of language or because of the presumption against extra-territoriality, could only be exercised within the United Kingdom. Lord Phillips considered (at para 97) that these submissions had some merit and they reinforced his view of the limited ambit of section 357.

53. In the present case the Divisional Court attempted to distinguish *Perry*. First, *Perry* obviously concerned a different statute and a different issue. The exercise of statutory interpretation must address the specific provisions and context of the statute under consideration. However, as I have already observed, there is a striking similarity between *Perry* and the present case. While it is not possible simply to read over the conclusion as to the ambit of the legislation in *Perry* to the circumstances of the present case, the similarity of the provisions and the issues under consideration is such that the reasoning of *Perry* is strongly supportive of the view that section 2(3) of the 1987 Act was not intended to confer a power to require disclosure by a foreign person abroad.

54. Secondly, Gross LJ observed that the critical consideration in *Perry* was that the persons to whom the notices were given were outside the jurisdiction and that it can fairly be said that *Perry* was not concerned with the giving of a notice to a person within the jurisdiction, in respect of documents or information held outside the jurisdiction. However, to my mind the fact that in the present case the July notice was served on Ms Akerson when she was induced to travel to the United Kingdom to attend a meeting with the SFO in London is not a material distinction. The intended recipient of the notice was KBR, Inc and it remains the case that the SFO is seeking disclosure of documents situated abroad from a company incorporated in the United States which had no fixed place of business in the United Kingdom and did not carry on business here.

55. Thirdly, Gross LJ sought to distinguish *Perry* on the basis that the addressees of the notices in that case had no connection with the United Kingdom other than the presence of assets here. That, of course, begs the question whether such a test should be applied in the present context, a matter to which I will return. Such a test played no part in the reasoning of Lord Phillips with whose judgment and reasoning on this point all the other members of the court agreed. Hughes LJ, in a concurring judgment, went on to make the following observation (at para 156) which is particularly pertinent to the present case:

> "For my part, if it were possible to construe the complex provisions of POCA in such a way as to admit of limited extraterritorial effect for Part 5, but only where there is a sufficient jurisdictional connection between a part of the UK and the criminal proceeds, I should have wished to do so. I am, however, reluctantly persuaded that this cannot be achieved by construction and would involve illegitimately re-writing the statute."

56. Following the decision of the Supreme Court in *Perry*, Parliament responded by amending the 2002 Act in the Crime and Courts Act 2013, Schedule 19, paragraph 26 which introduced sections 375A and B. It is significant that in this amendment Parliament has not conferred on SOCA the power to demand information from abroad on pain of criminal penalties but has made provision for a mutual legal assistance procedure which respects international comity through international agreement, reciprocity and mutually agreed conditions.

Other statutory provisions

57. The SFO relies, by way of analogy, on a number of authorities which, it claims, support its case that section 2(3) has extra-territorial effect.

58. In *R (Jimenez) v First-tier Tribunal (Tax Chamber)* the Court of Appeal held that paragraph 1 of Schedule 36 to the Finance Act 2008 empowered HMRC to issue a notice requiring a UK taxpayer resident outside the United Kingdom to provide information for the purpose of checking his tax position. Patten LJ identified two factors in particular which led him to that conclusion. The first (at para 39) was the subject matter and purpose of the legislation. The court was not concerned with the facilitation of private litigation but with the prevention of tax evasion which often has a cross-border aspect to it and which serves an important public purpose in maintaining public revenue. The second (at para 40) was that the strong policy objectives of conferring effective investigatory powers on HMRC were bolstered by the language of Schedule 36 itself. However, it is clear that in coming to his conclusion he was strongly influenced by two further factors, neither of which applies in the present case. The first of these is that the powers conferred were expressly limited for the purpose of checking the taxpayer's tax position and this therefore meant that the powers were necessarily and only exercisable in relation to someone who is or may be liable for tax in the United Kingdom and who, to that extent, had an identifiable relationship with the United Kingdom. Accordingly, a notice under paragraph 1 could only be given to someone who was or might be a UK taxpayer and it was that status rather than his place of residence which was the key to the availability and operation of the power. (See Patten LJ at paras 35, 39.) Secondly, in *Jimenez* non-compliance with a notice was not made a criminal offence and so the presumption that a statute should not be construed as making conduct abroad a criminal offence had no application. Patten LJ distinguished *Perry* on this basis. Both Patten LJ and Leggatt LJ considered that the sending of an information notice to a UK taxpayer in a foreign State requiring him to produce information that was reasonably required for the purpose of checking his tax position in the United Kingdom did not violate the principle of State sovereignty or contravene any international obligation of the United Kingdom. In Patten LJ's view *Jimenez* was not concerned with a statutory regime which criminalised the conduct abroad of a foreign national or which authorised a course of action abroad for a purpose which did not justify paragraph 1 having such a territorial reach. (See Patten LJ at paras 44, 48-49, Leggatt LJ at paras 51-57.)

59. In my view, these further features of *Jimenez* clearly serve to distinguish it from the present case. Unlike the statutory provision in *Jimenez*, section 2(3) of the 1987 Act does not identify any connection between a non-UK based recipient of a section 2(3) notice capable of founding and limiting subject-matter jurisdiction. Indeed, it was the absence of such a feature that led the Divisional Court to seek to import a judicially developed "sufficient connection" test. Furthermore, a person who without reasonable excuse fails to comply with a requirement imposed on him by section 2 of the 1987 Act commits a criminal offence by virtue of section 2(13). As a result, the present case bears a much stronger resemblance to *Perry* than it does to *Jimenez*.

60. The SFO also relies on a number of cases in which various powers under the Insolvency Act 1986 ("the 1986 Act") have been considered to have extra-territorial effect. These cases include *In re Paramount Airways Ltd* [1993] Ch 223, *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, *In re Mid East Trading Ltd* [1998] BCC 726; [1998] 1 All ER 577, *In re Omni Trustees Ltd (No 2)* [2015] EWHC 2697 (Ch); [2015] BCC 906 and *Bilta (UK) Ltd v Nazir (No 2)*. This matter was not argued before us in any detail. Furthermore, I note that there are conflicting decisions in relation to the extra-territorial scope of section 236 of the 1986 Act. (See *In re MF Global UK Ltd (No 7)* [2015] EWHC 2319 (Ch); [2016] Ch 325; *In re Omni Trustees Ltd (No 2)*; *In re Carna Meats (UK) Ltd; Wallace v Wallace* [2019] EWHC 2503 (Ch); [2020] 1 WLR 1176; *In re Akkurate Ltd* [2020] EWHC 1433 (Ch); [2020] 3 WLR 1077 at paras 46-55 per Sir Geoffrey Vos C.) In these circumstances, I propose to deal with the matter relatively briefly. These decisions are concerned with an entirely different statutory scheme from that in the present case and can, therefore, be relevant only by way of analogy. In the Divisional Court in the present case Gross LJ considered that the differences between the statutory regimes did not displace the analogy or obscure the similarities in terms of policy considerations. However, while it may be possible to identify comparable public interests at a very general level, as Lord Toulson and Lord Hodge made clear in their joint judgment in *Bilta* (at para 212) the question "whether the court can regulate the appellants' conduct abroad … is a question of the construction of the relevant statute". Similarly, in *In re Seagull Manufacturing Co Ltd* Peter Gibson J emphasised (at p 354) the need to consider whether the general presumption against extra-territorial effect was displaced by "the language of the legislation" and "the policy of the legislature in enacting the section in question". Differences in the statutory schemes cannot be glossed over by reference to public policy interests.

61. There are important differences in the wording, purpose and context of the statutory schemes. The power to wind up a company under the 1986 Act is not limited to a British company. Section 221 authorises the winding up of "any unregistered company" which is defined in section 220 as including "any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom". It therefore confers an express power to wind up overseas companies. Furthermore, the extra-territorial effect of the relevant powers conferred under the 1986 Act has been considered to be inherently linked to the winding up jurisdiction. (See *In re Seagull Manufacturing Co Ltd* at p 356 per Peter Gibson J.)

62. Moreover, particular safeguards are built into the statutory scheme of the 1986 Act. An example is provided by *In re Paramount Airways Ltd*. Section 238 of the 1986 Act provides that where a company subject to the insolvency jurisdiction of the English court has entered into a transaction with "any person" at an undervalue the court may make such order as it thinks fit for restoring the position. The Court of Appeal held that the court had jurisdiction under section 238 to make

an order against a foreigner resident abroad. Sir Donald Nicholls V-C (at p 239) considered that the expression "any person" in the legislation "must be left to bear its literal, and natural, meaning: any person". However, an important element of his reasoning was that Parliament was to be taken to have intended that the difficulties such a wide ambit might create would be sufficiently overcome by safeguards built into the statutory scheme. First, the order was to be made by a court which had a sufficiently wide discretion to enable it, if justice so required, to make no order (in particular, if the defendant was not sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element). Secondly, proceedings were not to be brought here unless the court had first granted leave for the proceedings to be served on the defendants abroad. (Sir Donald Nicholls V-C, p 239-241. See also *In re Seagull Manufacturing Co Ltd* at p 352 per Peter Gibson J; *Bilta* at para 110 per Lord Sumption.) There are no comparable safeguards in the present case.

63. In my view there is no sufficiently close analogy between the insolvency cases and the present case and I am unable to derive any assistance from them. On the contrary, the question whether a statutory power is to have any extra-territorial effect will depend on the wording, purpose and context of the specific statute when considered in the light of domestic principles of interpretation and principles of international law and comity.

A sufficient connection test

64. The Divisional Court adopted a reading of section 2(3) of the 1987 Act to the effect that the power might be used to require the production of documents held outside the jurisdiction by a foreign company subject to an implied requirement that there was a sufficient connection between the company and the jurisdiction. This had not formed part of the primary case of the SFO below but had been suggested by the Divisional Court.

65. Sir Donald Nicholls V-C in *In re Paramount Airways Ltd* (at pp 240, 242) drew attention to the "unlimited territorial application" of section 221 of the 1986 Act which gives power to courts in this jurisdiction to wind up overseas companies. He referred to the fact that, despite the breadth of the power, the court does not exercise it unless a sufficient connection with England and Wales is shown and there is a reasonable possibility of benefit for the creditors from the winding up. (See also *In re A Company (No 00359 of 1987)* [1988] Ch 210.) A similar view has been taken of sections 133 and 238 of the 1986 Act (*In re Seagull Manufacturing Co Ltd* (at p 356); *In re Paramount Airways Ltd* (at pp 239-240)). In this way, the courts have interpreted the 1986 Act as conferring the widest of powers but have provided a safeguard against the exorbitant exercise of those powers in the form of judicial discretion. This approach, however, provides no basis for the implication of a similar

limitation on section 2(3) of the 1987 Act. First, it was only necessary under the 1986 Act because such a broad reading of the power was compelled by the language, purpose and context of the provision. In my view, for reasons already stated, there is no warrant for such a broad reading of section 2(3) of the 1987 Act. In particular, such a reading would be inconsistent with the Parliamentary intention as evidenced by the scheme and history of the legislation. Secondly, section 2(3) confers a power not on a court but on the SFO. As a result, there is no scope here for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion. Thirdly, a statutory rule which empowers the SFO to demand the production of documents by foreigners outside the jurisdiction when there is a sufficient connection between the addressee and the jurisdiction, without defining what would constitute such a connection, would be inherently uncertain. Fourthly, there is no basis for the implication of such a limitation and any attempt to do so would exceed the appropriate bounds of interpretation and usurp the function of Parliament. As Hughes LJ put it in *Perry*, to do so would involve illegitimately re-writing the statute.

Conclusion

66. For these reasons I would allow the appeal.